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No. 89-556

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1989

STATE OF LOUISIANA, *ex rel.* WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF THE STATE OF LOUISIANA,

APPELLANT,

v.

UNITED STATES OF AMERICA, *et al.*

APPELLEES.

MOTION TO DISMISS APPEAL OF WILLIAM J. GUSTE, JR.

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QUESTIONS PRESENTED

1. Whether the conduct exhibited and procedures employed by the Louisiana Attorney General, William J. Guste, Jr., and his counsel in prosecuting this appeal constitute a basis for dismissal of the appeal.

2. Whether the Governor of Louisiana, as chief executive officer of the State, possesses supremacy over the Attorney General of Louisiana in articulating the legal position of the State in this litigation to the effect that the Attorney General's appeal is rendered a nullity and must be dismissed.

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APPELLEES.

MOTION TO DISMISS APPEAL OF WILLIAM J. GUSTE, JR.

I. INTRODUCTION

This Motion to Dismiss Appeal of William J. Guste, Jr. (the "Motion") is filed pursuant to Rule 16 of the Rules of the Supreme Court of the United States ("Supreme Court Rules"). The period for filing this Motion set forth in Rule 16.1, a rule of this Court not required by statute, has elapsed. Therefore, the State of Louisiana (the "State") respectfully requests an enlargement of time under Rule 16.1 to submit the Motion. While the State recognizes that the time for moving to dismiss has expired, the bases for this Motion are factually complex, have developed over a period of many months and are not typical of the usual grounds for dismissal under Rule 16. Moreover, the arguments contained in this Motion relate directly to the Motion to Supersede Counsel for State of Louisiana and to Strike Response In Opposition to State's Motion for A Stay Addressed to Individual Justice, filed by the Louisiana Attorney General, William J. Guste, Jr. ("Supersession Motion"), which presents issues that have not yet been decided by this Court. Case No. A-127.

If this Court should decide not to enlarge the time for filing, the State requests the Court to consider the information and argument

contained herein as supplemental to its previously filed State of Louisiana Memorandum in Response to Motion and Supporting Memorandum to Supersede Counsel for State of Louisiana and to Strike Response In Opposition to State's Motion for a Stay Addressed to Individual Justice Filed by the Louisiana Attorney General ("Louisiana Memorandum"), Case No. A-127.

II. BACKGROUND

The United States (the "Government") filed this lawsuit in 1974, alleging that the State and other defendants violated Title VI of the Civil Rights Act of 1964 and the Fourteenth Amendment to the Constitution of the United States.[1] On September 8, 1981, without any admission of liability, the parties entered into a consent decree ("Consent Decree") which was approved by a three-judge United States District Court and which was implemented by the parties for a period of approximately six years.[2] Consent Decree, Joint Appendix 199a.[3] Shortly before the expiration of the Consent Decree, the Government and defendant Board of Supervisors of Southern University and Agricultural and Mechanical College ("Southern University")

[1] For a more detailed discussion of the facts of this case, see Jurisdictional Statement filed November 15, 1989, on behalf of the State of Louisiana, *ex rel.* Charles E. "Buddy" Roemer, III, Governor of the State of Louisiana, Board of Regents of the State of Louisiana, Board of Trustees for Louisiana State Colleges and Universities, and Board of Supervisors of Louisiana State University and Agricultural and Mechanical College ("State Jurisdictional Statement") at 5-8, Case No. 89-771.

[2] References to attachments to documents previously submitted to this Court will be abbreviated as follows: those contained in Joint Appendix to Jurisdictional Statement, Volumes I and II, filed by William J. Guste, Jr. and Board of Supervisors of Southern University and Agricultural and Mechanical College, Case Nos. 89-556 and 89-557, will be referred to as "Joint Appendix"; those contained in Appendix to State Jurisdictional Statement will be referred to as "Appendix"; those attached to Louisiana Memorandum will be referred to as "Louisiana Memorandum Appendix Exh."; and those attached to State of Louisiana Opposition to Application for Stay Filed by Southern University and Motion for Stay Filed by Louisiana Attorney General will be referred to as "State Opposition Appendix Exh." Other documents referenced in this Motion are contained in State Appendix to Motion to Dismiss Appeal of William J. Guste, Jr. ("State Appendix"), which is filed simultaneously with the Motion. References are also made to documents filed in this Court by title and date.

[3] *See also* Final Report, Joint Appendix 625a.

filed separate motions for a hearing to determine whether a unitary system of higher education in Louisiana had been achieved.[4] Motion for Hearing and Memorandum in Support of Motion for Hearing (Dec. 29, 1987), State Appendix 1a; Motion for Hearing and Memorandum in Support of Motion for Hearing (Dec. 31, 1987), State Appendix 7a.

The trial court never conducted the hearing. Instead, the court requested motions for summary judgment and, on August 2, 1988, granted the Government's motion for partial summary judgment on the issue of liability.[5] The court then instructed the parties to submit proposed plans to desegregate public higher education in Louisiana, Minute Entry of October 7, 1988, Appendix 7a, and the case moved into its remedy phase.[6]

Throughout the liability phase of the case, the State was represented by Louisiana Attorney General William J. Guste, Jr., and his staff attorneys, and John N. Kennedy, Special Counsel to Governor Charles E. "Buddy" Roemer, III (the "Governor"). In December 1988, after the case entered its remedy phase, Joseph J. Levin, Jr. was retained by the State, and on January 20, 1989, Mr. Guste's Assistant Attorney General, Winston DeCuir, filed a motion formally requesting

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[4] Although the Government and Southern University filed separately, the motions and supporting memoranda are practically verbatim in their content. It appears that Southern University actually copied the Government's motion to the extent that at times Southern University failed to substitute its own name for that of the Government. *See* Motion For Hearing and Memorandum in Support of Motion for Hearing, filed December 31, 1987, by Southern University ("Memorandum"), State Appendix 7a. Additionally, in its Memorandum, Southern University conceded that its interests were more closely aligned with the Government than with the other defendants. *Id.*

[5] *See* Minute Entry of March 31, 1988, Appendix 5a; *United States v. Louisiana*, 692 F. Supp. 642, 659 (E.D. La. 1988), Joint Appendix 38a.

[6] The case was tried in two phases: the liability phase and the remedy phase. The liability phase began December 29, 1987, when the Government filed its motion for a hearing, and ended August 2, 1988, when the trial court granted the Government's motion for partial summary judgment. *United States v. Louisiana*, 692 F. Supp. at 659, Joint Appendix 38a. Thereafter, the remedy phase began, which ended on August 4, 1989, with the trial court's ruling on post trial motions. *United States v. Louisiana*, 718 F. Supp. 499 (E.D. La. 1989), Joint Appendix 39a; *United States v. Louisiana*, 718 F. Supp. 521 (E.D. La. 1989), Joint Appendix 105a; *United States v. Louisiana*, 718 F. Supp. 525 (E.D. La. 1989), Joint Appendix 81a.

the trial court to admit John N. Kennedy, Joseph J. Levin, Jr. and Carla Calobrisi (Mr. Levin's associate) as additional counsel to represent the State. Motion to Enroll Additional Counsel of Record ("Motion to Enroll"), filed on Jan. 20, 1989, Louisiana Memorandum Appendix Exh. 9.[7] Mr. Guste and his staff, while remaining as co-counsel, took a much less active role during the remedy phase of the litigation. Mr. Kennedy and Mr. Levin took the lead in the State's representation, drafting documents, filing motions, conducting discovery, attending hearings and presenting evidence.

While maintaining separate legal counsel, defendant Board of Regents of the State of Louisiana ("Regents"), defendant Board of Trustees for Louisiana State Colleges and Universities ("Trustees") and defendant Board of Supervisors of Louisiana State University and Agricultural and Mechanical College ("LSU") consistently supported the State's position during the liability and remedy phases of the trial.[8] The Government and Southern University maintained positions generally consistent with each other and always in opposition to the State and the other defendants.

During the course of the remedy phase, two parties, both represented by the law firm of McGlinchey, Stafford, Mintz, Cellini & Lang (the "McGlinchey Law Firm"), filed unsuccessful motions for leave to intervene as *amicus curiae* in the law suit. One such motion to appear as *amicus curiae* was filed on March 3, 1989, on behalf of the

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[7] The Motion to Enroll requested the court to enroll John N. Kennedy and Joseph J. Levin, Jr. as additional counsel of record and as trial attorneys, Carla Calobrisi as additional counsel of record and Winston DeCuir as resident attorney. A designation of trial attorney is required pursuant to Rule 1.04 (formerly Rule 2.3) of the Uniform Local Rules, United States District Courts for the Eastern District of Louisiana, Middle District of Louisiana and Western District of Louisiana, effective May 15, 1989, State Appendix 320a. The trial attorney, who must be designated when more than one lawyer represents a party, is responsible for the case. *Id.* The trial court enrolled each attorney as additional counsel and designated Mr. Kennedy as sole trial attorney and Mr. DeCuir as local attorney. Order, Jan. 20, 1989, Louisiana Memorandum Appendix Exh. 9.

[8] For example, Regents, Trustees and LSU supported the Proposed Plan to Desegregate the System of Higher Education in the State of Louisiana submitted by Governor Charles E. "Buddy" Roemer, III on behalf of the State of Louisiana (the "State Plan"), Louisiana Memorandum Appendix Exh. 5, which was filed with the trial court on November 14, 1988, and amended January 20, 1989.

Governor's Commission on the Availability of College Education for Qualified Louisiana Youth (the "Commission"), chaired by Patrick F. Taylor. Commission's Motion to Appear as *Amicus Curiae,* State Appendix 15a. The motion, denied as untimely, contained a strong endorsement of the "Taylor Plan." [9] Minute Entry, March 6, 1989, State Appendix 45a. The motion was prepared and filed by counsel for the Commission, Dermot S. McGlinchey of the McGlinchey Law Firm, which also represented at that time and continues to represent Mr. Taylor personally. *See Ethics Board to Check Firm's Legality,* Monroe News Star, Oct. 27, 1989, at 1A, col. _, State Appendix 47a. Neither counsel for the State nor Governor Roemer was aware that this motion would be filed or consented to it.

On July 11, 1989, before the trial court had entered its Opinion and Order ("Remedial Order"), *United States v. Louisiana,* 718 F. Supp. 499 (E.D. La. 1989), Joint Appendix 39a, the McGlinchey Law Firm filed another *amicus curiae* motion, which was also denied, on behalf of a new client, Trustees, in order yet again to present to the court the "Taylor Plan." Order, July 13, 1989, State Appendix . This motion and the previous motion to intervene filed by the McGlinchey Law Firm were virtually identical. *Compare* Commission's Motion to Appear as *Amicus Curiae,* State Appendix 15a, *with* Trustees' Motion to Appear as *Amicus Curiae,* State Appendix 52a.

The motion on behalf of Trustees was filed despite the fact that Trustees, as a named defendant, was represented throughout the liability and remedy phases of the case, and continues to be represented, by Robert Kutcher of the law firm of Bronfin, Heller, Steinberg & Berins. *See* Order, July 13, 1989, State Appendix 50a. With the exception of the *amicus curiae* filings of the McGlinchey Law Firm, the Taylor Plan was never mentioned by any party in any phase of the case until it was touted as a panacea in the Jurisdictional Statements filed in this Court by Mr. Guste and by Southern University. The

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[9] The "Taylor Plan" was authored by Patrick F. Taylor, a politically involved Louisiana businessman. Hill, *Privately Funded Legal Help Illegal,* The Times, Oct. 29, 1989, at_, col._, State Appendix 84a. It is a statute (Senate Bill 280) which was enacted July 10, 1989, and which provides free higher education to all Louisiana students who meet certain educational and economic requirements. *See* "Taylor Plan," Joint Appendix 144a; Order, July 13, 1989, State Appendix 50a.

McGlinchey Law Firm helped prepare the Guste Jurisdictional Statement.[10]

On August 3, 1989, after the trial court had rendered its Remedial Order and while Governor Roemer was out of the country, Mr. Guste suddenly filed a post-trial motion, entitling it Notice to Join in Motion of the Southern University Board of Supervisors for a New Trial and/or Motion to Alter or Amend Judgment ("Notice to Join"), Louisiana Memorandum Exh. 10. This filing by Mr. Guste surprised as well as puzzled the trial court and most of the parties with the exception of Southern University.[11] It was a surprise because Mr. Guste had never made any previous objection to the State's proposed remedy, which was supported by the State, Regents, Trustees and LSU, and had been adopted by the trial court almost in its entirety.[12] Ironically, Mr. Guste's fundamental objection to the Remedial Order was, and remains, the creation of a single governing board for public higher education in Louisiana to replace the current four boards, which was the principal remedy unceasingly and publicly promoted by the

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[10] The State does not question the merits of the Taylor Plan. Rather, the more appropriate question to be asked is why it became so important at this time. Mr. Guste, in his Jurisdictional Statement, which was authored by Mr. McGlinchey and the McGlinchey Law Firm, as well as Southern University in its Jurisdictional Statement, clearly promoted Mr. Taylor and his "plan." *See* Jurisdictional Statement on Behalf of the State of Louisiana ("Guste Jurisdictional Statement") at 8; Jurisdictional Statement of Southern University ("Southern University Jurisdictional Statement") at 7. Considering Mr. Taylor's financial support of Mr. Guste's attorneys' fees and Mr. McGlinchey's and the McGlinchey Law Firm's benefit in helping their client, the citizens and taxpayers of Louisiana are entitled to ask if these circumstances had anything to do with the promotion. *See* discussion *infra* pp. 24-26.

[11] Southern University not only knew Mr. Guste was joining its motion but Mr. Guste admitted that State Senator William J. Jefferson, counsel for Southern University, prepared Mr. Guste's Notice to Join as well as Motion to Withdraw, (defined *infra* p. 7), and that Senator Jefferson actually filed both for Mr. Guste. *SU Wrote Guste's Motion*, The Shreveport Times, Sept. 2, 1989, 1A, col._, State Appendix 86a; *Jefferson Was Convenient For College Case*, Guste Says. The Times-Picayune, Sept. 3, 1989, A-35, col. _, State Appendix 90a.

[12] The trial court on its own initiative ordered the merger of the LSU Paul M. Hebert Law Center and the Southern University Law Center in its Remedial Order, a remedy not proposed by the State or any other party to this litigation. *United States v. Louisiana*, 718 F. Supp. at 507, 513-15, 518-19, Joint Appendix 50a, 60a-62a, 71a-73a.

State for more than nine months with Mr. Guste's knowledge and consent.[13]

Mr. Guste's challenge to the Remedial Order also was puzzling because in his motion he designated Senator William J. Jefferson, counsel for Southern University, as counsel to represent the "particular interests of the Attorney General." Notice to Join, Louisiana Memorandum Appendix Exh. 10. As previously noted, throughout this litigation Southern University has been an opponent of the State and the remaining defendants and has closely aligned itself with the plaintiff.[14] Mr. Guste realizing the conflict created by this designation, *see* State Appendix 90a, the next day filed a Motion to Withdraw "Notice to Join in Motion of the Southern University Board of Supervisors for a New Trial And/Or Motion to Alter Or Amend Judgment" and Motion to Enroll Counsel of Record ("Motion to Withdraw"), Louisiana Memorandum Appendix Exh. 12, in which Mr. Guste withdrew his appointment of Senator Jefferson and, instead, renamed himself and certain members of his staff as counsel. These filings began Mr. Guste's crusade to alter the State's position and marked the first activity in the case by Mr. Guste since he and Mr. Kennedy represented the State on the issue of liability.

Mr. Guste's next step in attempting to reverse the State's position on remedy, was to bring this matter before this Court. On August 11, 1989, Mr. Guste filed a Motion for Stay Addressed to Individual Justice.[15] Case No. A-127. The only other party filing an application

[13] Governor Roemer has long supported the creation of a single governing board, believing it preferable to merge boards instead of schools. The State, however, formally presented its support of the single board when it filed the State Plan in November 1988. State Plan, Louisiana Memorandum Appendix Exh. 5.

[14] The question remains whether Southern University, a State entity, has standing to litigate a position which is contrary to that of the State. For discussion on whether Southern University has standing, see Minute Entry of Aug. 1, 1989, State Appendix 92a; Response of LSU to Rule 59 Motions, Aug. 3, 1989, State Appendix 93a; Regents Memorandum on Standing, Aug. 3, 1989, State Appendix 98a.

[15] While the State opposed Mr. Guste's motion for stay, the State has never conceded liability and has in fact appealed the trial court's liability order. The State also contends, however, that should this Court affirm the lower court's finding of liability, the remedy ordered by the trial court, with the exception of the merger of the law schools, is the most appropriate remedy and shows the greatest likelihood of success under the present circumstances in Louisiana. State Jurisdictional Statement 1.

for a stay in this Court was Southern University. Application to Stay Mandate of a Three-Judge District Court of the Eastern District of Louisiana Pending Appeal, filed on August 10, 1989, Case No. A-126.

Simultaneously with his motion for a stay, Mr. Guste filed a Notice of Appeal to the Supreme Court ("Guste Notice of Appeal") and, on August 16, 1989, asked the Court to remove Mr. Kennedy, Mr. Levin and Ms. Calobrisi as counsel for the State. Supersession Motion. Thereafter, Mr. Guste filed the Guste Jurisdictional Statement, purportedly on behalf of the State, which was prepared by his "Special Counsel,"[16] the McGlinchey Law Firm, accompanied by an appendix which was filed jointly with Southern University. Joint Appendix, Case Nos. 89-556 and 89-557. On November 15, 1989, the State, through Governor Roemer, Regents, Trustees and LSU, filed the State Jurisdictional Statement. Case No. 89-771.

The State respectfully requests this Court to dismiss the appeal filed by Mr. Guste, to strike the Guste Jurisdictional Statement and, as a component of such dismissal, to disqualify Mr. Guste and his staff and Mr. McGlinchey and the McGlinchey Law Firm from further participation in these proceedings. The State contends that the conduct of Mr. Guste and the representation of Mr. Guste's position by the McGlinchey Law Firm in the preparation of the Guste Jurisdictional Statement fatally taint the instant appeal in at least six respects:

1. Mr. Guste made a false representation to this Court concerning his knowledge of the State's position on remedy;

2. Mr. Guste does not possess supremacy over the Governor in articulating the legal position of the State;

3. Mr. Guste is procedurally and ethically barred from asserting a position adverse to the State;

4. Mr. Guste failed to raise the issues presented in his Supersession Motion in a timely fashion, either to this Court or to the court of original jurisdiction;

5. The McGlinchey Law Firm previously represented a defendant in this case whose position on the issue of remedy is opposed to that asserted by Mr. Guste; and

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[16] The McGlinchey Law Firm is designated "Special Counsel" in the Guste Jurisdictional Statement and Joint Appendix.

6. The McGlinchey Law Firm was retained by and represented Mr. Guste but was to be paid by a third party, private individual, thereby violating the Louisiana Code of Governmental Ethics ("Louisiana Ethics Code"), La. Rev. Stat. Ann. § § 42:1101-1169.

III. ARGUMENT

A. William J. Guste, Jr. Made A False Representation To This Court.

Mr. Guste made a material and inescapably false representation to this Court in attempting to explain and excuse his belated attempts to reverse the position of the State in this case. In arguing to this Court that State counsel Kennedy, Levin and Calobrisi should be replaced by himself and his staff, Mr. Guste falsely asserted that "[he] did not and could not reasonably expect that the abolition of the four boards of higher education would become part of the remedial scheme actually ordered [by the trial court]." Supersession Motion at 14.

Although primary responsibility for the State's litigation of the remedy phase shifted, with Mr. Guste's consent, from Mr. Guste to Mr. Kennedy, Mr. Levin and Ms. Calobrisi, Mr. Guste and various lawyers from the Louisiana Attorney General's office have been counsel and co-counsel of record and resident counsel to the State in this case since even before its revival in late 1987. *See supra* pp. 3-4. As co-counsel, Mr. Guste and his staff received copies of all pleadings filed in the case.

Consequently, as early as the trial court's finding of liability on August 2, 1988, Mr. Guste must have been aware that the court was seriously considering the abolition of the four-board system of governance. Indeed, in exploring remedies for the violations it had found and even before the State had adopted its single board position, the trial court on its own initiative identified the multiple board system as a primary target: "A possible remedy that suggests itself to the court would be one that . . . vests the State supervision over the institutions to a single board." *United States v. Louisiana,* 692 F. Supp. at 658, Joint Appendix 35a. In a subsequent order, arising from a status conference and served upon Mr. Guste's Assistant Attorney General, the court also specifically characterized the single board as a "good

beginning and focal point to fashion a remedy" and concluded "that such a requirement is likely to be a part of any remedy that will be adopted or imposed." Opinion and Order, Nov. 22, 1988, State Appendix 103a. *See also* Certificate of Loretta G. Whyte (Dec. 22, 1989), State Appendix 106a.

Other evidence also points to Mr. Guste's almost certain knowledge that the State would argue and was arguing in favor of a single board. At the conclusion of the liability phase of the case, Governor Roemer appointed a bi-partisan task force to study the remedial options available to the State which might be included in its desegregation plan to the court. Final Report, Joint Appendix 638a. The report of this task force recommended as its centerpiece and most important ingredient the establishment of a single governing board for public higher education in Louisiana. Final Report, Joint Appendix 639a. This recommendation was adopted by the State and included in the State Plan. *Id.*

Additionally, during the course of the trial on remedy before the Special Master, the State presented extensive expert witness testimony in support of a single board and the abolition of the multi-board system in the form of written reports prepared by Dr. Eugene P. Trani, Vice President for Academic Affairs, University of Wisconsin System; Dr. Roy E. McTarnaghan, Vice Chancellor, University of Florida System; Dr. Kerry Davidson, Deputy Commissioner, Academic Affairs, Louisiana Board of Regents; Dr. James Wharton, Chancellor Emeritus, Louisiana State University; and Joe D. Smith, former member of the Board of Regents of Louisiana, Chairman of the Consent Decree Monitoring Committee and Member of the Governor's Special Task Force on Desegregation of Higher Education. In fact, of the over seventy witnesses who presented written testimony at the remedial hearing, virtually all took a position for or against the abolition of the four boards and the creation of a single board. Final Report, Joint Appendix 709a-715a. Over thirty of these witnesses were examined in depositions, which were subsequently entered into evidence. Drs. McTarnaghan and Wharton also presented live testimony in support of the single board at a public hearing conducted by the Special Master in March 1989. *Id.* 628a.

The importance to the State's case of the abolition of the four-board system was not lost on the Special Master, who wrote in his Recommended Remedial Plan filed April 19, 1989:

> The focus of much of the evidence and testimony at the hearing before the Master, and in the Court's initial suggestions to the parties, has been the creation of a single board to operate the public system of higher education in Louisiana. The state defendants including the Governor, the LSU System, the Board of Trustees and the Board of Regents all favor this concept even though it will result in a reduction or elimination of authority currently enjoyed by some of them.

State Appendix 107a. Almost identical language is contained in the Special Master's Final Report. Joint Appendix 652a. During all of this time, Mr. Guste and his staff attorneys remained as co-counsel to the State in the case and received copies of the trial court's rulings as well as those of the Special Master. *See, e.g.*, Certificate of Loretta G. Whyte (Dec. 22, 1989), State Appendix 106a.

Finally, Mr. Guste's bald assertion that he did not know about the single board issue is rendered all the more incredible by the overwhelming media attention given to the proposed abolition of the four boards and the creation of a single board.[17] During the remedy phase of the case, more than 50 articles and commentaries appeared prominently in Baton Rouge, New Orleans and Shreveport daily newspapers alone, in which the State's proposed single board position was analyzed and discussed in detail. *See, e.g.*, State Appendix 110a.

For Mr. Guste, at this late date, to claim that he could not reasonably have expected the elimination of the four-board system to be included in the trial court's remedial plan is a complete fabrication. This Court should not countenance Mr. Guste,s participation in this case for that reason alone.

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[17] Some newspaper articles speculated that Mr. Guste's belated involvement in the case had more to do with courting votes than protecting the four-board system in Louisiana's Constitution. *See, e.g.*, *Guste Jumps Back and Forth*, Lafayette Daily Advertiser, Sept. 25, 1989, at _, col._, State Appendix 157a; Wardlaw, *Guste's Entry in Desegregation Case Stirs the Waters*, Times-Picayune, Aug. 16, 1989, at _, col. _, State Appendix 158a; see also State Opposition Appendix.

B. Mr. Guste Is Barred From Asserting A Position Adverse To The Position Of The State.

Mr. Guste is barred on three additional and separate legal grounds from asserting a position on behalf of the State which is adverse to the State's position presented at trial: first, Louisiana case law and the Louisiana Constitution make it clear that Mr. Guste does not possess supremacy over the Governor in articulating the legal position of the State;[18] second, Mr. Guste is procedurally and ethically barred from asserting a position adverse to the State's position as articulated by the Governor; and, third, Mr. Guste's Supersession Motion was untimely filed. Consequently, Mr. Guste has no standing to submit his own appeal.

1. Louisiana Case Law And The Louisiana Constitution Reject Mr. Guste's Claim Of Legal Supremacy Over The Governor.

The supremacy of Mr. Guste over the Governor is a necessary prerequisite to Mr. Guste's purported representation of the State.[19] Both Louisiana case law and the Louisiana Constitution illustrate that Mr. Guste has no such "supremacy" and, in fact, that the Governor, as Louisiana's chief executive officer, has the constitutional authority and responsibility to determine the position and policy of the State in this litigation and all other to which the State is a party or in which the State has an interest.

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[18] Mr. Guste has accused the Governor of violating his oath to defend the Louisiana Constitution by proposing a single board. Supersession Motion at 10, 14-15. Supposedly, this is the reason Mr. Guste has independently decided to reverse the remedial position maintained by the State. *Id.* While it is true that the Governor has sworn to uphold the state constitution, his oath, and that of Mr. Guste, also include a commitment to uphold the United States Constitution. If, as the trial court found, the State's constitutionally mandated multi-board system promotes segregation, thereby creating a conflict between the state and federal constitutions, the Governor's obligation to support the federal constitution prevails pursuant to the Supremacy Clause of the Constitution of the United States. U.S. Const. art. VI, cl. 2. The same is true for Mr. Guste.

[19] As recently as December 21, 1989, Mr. Guste again "insist[ed] upon his exclusive prerogative to represent the State of Louisiana at the Bar of this Court." Memorandum of the State of Louisiana in Opposition to United States' Motion to Dismiss at 10, n.6, Case No. 89-556 (dated Dec. 29, 1989).

a. Case Law

The State has previously discussed the case of *State, ex rel. Guste v. Texaco. Inc.*, 433 So. 2d 756 (La. App. lst Cir. 1983), before this Court. Louisiana Memorandum at 4. *Texaco* demonstrates that Mr. Guste's title under the Louisiana Constitution of 1974 as "chief legal officer" does not mean that he can replace the Governor as spokesman for the State whenever he wishes or attempts to enter a legal proceeding. In *Texaco,* Mr. Guste challenged Governor Edwin Edwards' opposition to the payment of attorneys' fees to a special counsel. Instead of treating Mr. Guste as the definitive spokesman for the interests of the State, both the *Texaco* trial and appellate courts ruled in favor of *"the State's position"* as articulated by Governor Edwards. *Id.* at 759 (emphasis added).

The affirmance of the Governor's position in *Texaco* is consistent with Louisiana case law under predecessor state constitutions: "The Louisiana Supreme Court on frequent occasions has construed Article VII, Section 56 [the Attorney General Clause under the 1921 constitution], as not conferring an exclusive charge and control of all legal matters in which the state has an interest in favor of the Attorney General." *State , ex rel. Guste v. Louisiana Bd. of Highways*, 275 So. 2d 207, 213 (La. App. lst Cir. 1973), *aff'd* 289 So. 2d 82 (La. 1974).

The *Louisiana Board of Highways* court cited two twentieth-century Louisiana Supreme Court cases in support of its position: *Kemp v. Stanley,* 204 La. 110, 15 So. 2d 1, 9 (1943), and *Ricks v. Department of State Civil Service*, 200 La. 341, 8 So. 2d 49, 60 (1942). It also cited a nineteenth-century Louisiana Supreme Court case denying claims of legal supremacy by the Louisiana Attorney General. *State v. Dubuclet,* 25 La. Ann. 161 (1873).

Mr. Guste's Supersession Motion failed to cite any of the relevant twentieth-century Louisiana cases in which he was a named party. His motion acknowledged only the 1873 case of *Dubuclet,* which Mr. Guste attempted to dismiss as "a case decided under provisions existing in a past constitution (1868) five times (i.e., [sic] five constitutions) removed from Louisiana's current constitution ...." Supersession Motion at 18. Yet, the Louisiana constitutional case law tradition from *Dubuclet* in 1873 to *Texaco* in 1983 has consistently

rejected claims by any Louisiana Attorney General that he possesses the sole and absolute power to speak for the State in legal proceedings.

b. The Louisiana Constitution

(1) Chief Legal Officer

Mr. Guste relies heavily and, by necessity, almost exclusively upon the language of Article IV, Section 8 of the Louisiana Constitution of 1974, State Appendix 161a, in his efforts to "supersede" duly authorized counsel for the State. Supersession Motion at 11. However, the official records of the constitutional convention that drafted the 1974 state constitution demonstrate that the reference in Section 8 to the attorney general as "the chief legal officer of the state" is merely an introductory truism. It is not a technical term indicating some substantive or overall supervisory power.

The phrase is an innovation not found in the prior Louisiana Constitution of 1921. *See* Hargrave, *The Judiciary Article of the Louisiana Constitution of 1974*, 37 La. L. Rev. 765, 834 (1977) [hereinafter "Hargrave"], State Appendix 162a.[20] It appeared in the proposal submitted to the convention by the Committee on the Executive Branch ("Executive Committee"), which was charged with the responsibility of drafting the 1974 constitution's provisions on the executive branch of Louisiana state government. Committee Report With Respect to Committee Proposal No. 4, § 8, in Records of the Louisiana Constitutional Convention of 1973: Journal of Proceedings [hereinafter "Records-Journal"], vol. I, at 95, State Appendix 173a. *See* Hargrave, *supra,* at 834, State Appendix 167a. The comments provided by the Executive Committee to its proposal simply stated that "[t]he attorney general is made the state's ‚chief legal officer„" without further explanation. Committee Report With Respect to Committee Proposal No. 4, § 8, in Records-Journal, *supra,* vol. I, at 95, State Appendix 185a. *See* Hargrave, *supra,* at 834 n.306, State Appendix 167a. The Convention's Judiciary Committee also proposed a section to govern the attorney general, but it did not contain the "chief legal officer" language. The Judiciary Committee's proposal simply used the language of the prior constitution. Commit-

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[20] Professor Hargrave is a professor of law at the LSU Paul M. Hebert Law Center and was Coordinator of Legal Research for the Louisiana Constitutional Convention of 1973.

tee Report With Respect to Committee Proposal No. 6, §§ 28, 29, in Records-Journal, *supra* p.14, vol. I, at 100, State Appendix 184a. *See* Hargrave, *supra*, at 834 n.306, State Appendix 167a.

The proposal concerning the attorney general submitted by the Executive Committee reached the convention floor before the proposal of the Judiciary Committee, since the Executive Committee's proposal was part of the overall provisions on the executive branch, but the powers of the attorney general were not considered at that time. Instead, to avoid a heated debate, part of which involved the proper jurisdiction of the committees, the convention voted to delay consideration of the powers of the attorney general. Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts [hereinafter "Records-Transcripts"], vol. VI, at 624-26, State Appendix 201a. *See* Hargrave, *supra* p.14, at 831, State Appendix 164a. Delegate Camille Gravel, a member of the Executive Committee, proposed an amendment that deleted the Executive Committee proposal's reference to the attorney general's powers and instead simply provided that "[t]here shall be a department of justice, headed by the attorney general who shall be the state's chief legal officer." Explaining his proposal, Mr. Gravel said:

> [A]ll that this does is to create the department of justice within the executive department and to constitutionally declare that the attorney general shall be the head of that department and the state's chief legal officer. *All of the matters relating to the functions, powers and duties of the department and of the office of attorney general will be relegated to future consideration when we consider the judiciary article.*

Records-Transcripts, *supra* p.14, vol. VI, at 625 (emphasis added). *See* Hargrave,*supra* p.14, at 821 n.292, State Appendix 163a.

The reference to "chief legal officer" thus remained, but, as the comment from Mr. Gravel indicates, only as an introductory expression without substantive meaning with regard to powers, functions or duties. The "chief legal officer" language, which is now the first paragraph of Section 8, merely establishes the department of justice and the fact that its head, *i.e.*, "the chief legal officer of the state," is the attorney general. The specifics of the attorney general's powers

were to be (and were in fact) handled later when the Judiciary Committee's proposal was considered.

Once the consideration of the powers of the attorney general was completed upon debate of the Judiciary Committee's proposal, the introductory paragraph in Article IV, Section 8 containing the "chief legal officer" language was followed by two specific categories of powers in two specific paragraphs. The second paragraph specifies the constitutional powers granted to the attorney general and also limits those specified powers. The third paragraph leaves to the legislature (and to other constitutional provisions) the determination of the "other powers" and "other duties" of the office. Records-Transcripts, *supra* p.14, vol. IX, at 3377-81. *See* La. Const. art. IV, § 8; Hargrave, *supra* p.14, at 831, State Appendix 166a.

(2) Executive Branch Officer

The placement of Section 8, pertaining to the attorney general, in Article IV of the 1974 Louisiana Constitution, pertaining to the executive branch of state government, rather than in Article V, pertaining to the judicial branch, indicates that the attorney general is an executive officer operating under the governor, who in Article IV, Section 5(A) is designated "the *chief* executive officer of the state." La. Const. art. IV, § 5(A) (emphasis added). State Appendix 275a.

During the convention debate on the executive branch article, it was suggested that even the introductory reference in Article IV, Section 8 to the department of justice and the attorney general should be deleted and that all matters concerning both should be handled in the article on the judicial branch of the state government. Records-Transcripts, *supra* p.14, vol. VI, at 625-26, State Appendix 201a. The failure to do that, plus the later transfer of the provisions on the powers of the attorney general to executive branch Article IV, clearly leads to the conclusion that the attorney general is and was meant to be a part of the executive branch, which is headed by the governor. Most certainly, the attorney general could have been but was not made a part of the judiciary, which is independent of the executive branch. Delegate Camille Gravel, a former executive counsel to the governor and a top advisor to the governor at the time, who dealt with the then (and now) attorney general, said quite clearly in response to that suggestion:

> No sir. I think that most of us agree that the attorney general should be in the executive branch of government. In the previous discussion on that . . ., I believe the desire of this convention was to consider the functions of the attorney general's office under the judiciary article but generally with an understanding that probably those functions would then be placed back in the executive article where we will have created, if this amendment passes, the department of justice within the executive branch.[21]

Another member of the Executive Committee, delegate (now federal judge) Tom Stagg, was even more candid. In alluding to the powers of the attorney general, Mr. Stagg said that the Executive Committee :

> debated what ought to be the powers that would adhere to that office for him effectively to be able to be the state's chief legal officer, to guard the rights of all of the people of the state, without having him so much authority that he might become more than just the state's chief legal officer.

Records-Transcripts, *supra* p.14 vol. VI, at 880 (emphasis added), State Appendix .

It is clear, therefore, that any argument of purported supremacy that rests on the state constitution's designation of the attorney general as "the chief legal officer of the state" must also deal with the incontrovertible fact that the same document designates the governor "the chief executive officer of the state" with authority over all other executive officers, including the attorney general. Here, the issue is who establishes policy for the state in this litigation, and in this case Mr. Guste is demanding to be the client, rather than the attorney. The Louisiana Constitution of 1974 gives him no such authority.

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[21] Records-Transcripts, *Supra* p.14, vol. VI, at 626, State Appendix 201a. Article IV, Section 1(A) of the 1974 Constitution was also amended to list the attorney general as a member of the executive branch, although the attorney general had been omitted at one point. Article IV, Section 1(A) provides that "[t]he executive branch shall consist of the governor, lieutenant governor, secretary of state, attorney general, treasurer, commissioner of agriculture, commissioner of insurance, and all other executive officers, agencies, and instrumentalities of the state." La. Const. art. IV, § 1(A), State Appendix 277a.

(3) Cause – Misconduct

Finally, to supersede an attorney for the State, as Mr. Guste is attempting to do here with respect to Mr. Kennedy, Mr. Levin and Ms. Calobrisi, the attorney general must establish "cause." La. Const. art. IV, § 8, State Appendix 161a. "Cause" means that the attorney "is not fulfilling his duties satisfactorily." Hargrave, *supra* p. 14, at 835, State Appendix 168a.

The drafters of Louisiana's current constitution discussed the meaning of "cause" rather extensively. The records of the constitutional convention are replete with references to the need for some kind of misconduct or failure to act in order to justify the supersession. Records-Transcripts, *supra*, p.15 vol. VI, at 902-14. *See* Hargrave, *supra* p.14, at 835-36, State Appendix 168a. Here, Mr. Guste is not alleging that Mr. Kennedy, Mr. Levin and Ms. Calobrisi are failing to perform their duties properly or are failing properly to research the law.[22] Rather, Mr. Guste objects to the legal positions taken by these attorneys, at the instruction of the Governor, as to the proper court-ordered remedy for a court-determined violation. This is a matter of policy, not legal practice. Mr. Guste really is asking to have his policy choices predominate over those of the Governor, which, as previously explained, Mr. Guste is not entitled to do under either Louisiana case law or the Louisiana Constitution. For this additional reason, therefore, Mr. Guste's argument must fail.

2. Mr. Guste Is Procedurally And Ethically Barred From Asserting A Position Adverse To The State On Appeal.

The State has previously explained why *Graddick v. Newman*, 453 U.S. 928 (1981), warrants dismissal of Mr. Guste's attempt to speak for the State before this Court as a matter of federal law. Louisiana Memorandum at 6. While recognizing the existence of *Graddick*, Mr. Guste asserts that "*Graddick* bears no resemblance to . . . [this litigation]" and "is no authority against the Attorney General's participation herein . . . ." Supersession Motion at 16, 18. Mr. Guste, however, conveniently fails to mention the discussion in *Graddick* of the untimely nature of the Alabama Attorney General's attempt to

[22] Indeed, in his letters of "dismissal" directed to Mr. Kennedy, Mr. Levin and Ms. Calobrisi, Mr. Guste commended their performance. Letters from Mr. Guste to Mr. Levin and Mr. Kennedy (Aug. 11, 1989), State Appendix 278a.

assert a position on behalf of the state which opposed the position of the Alabama Governor.

In *Graddick*, this Court held that "equitable concern" weighed against the Alabama Attorney General's attempt to challenge the governor's position and gain a stay of a three-judge federal panel's civil rights decision, due to the attorney general's "unexplained tardiness" in entering the case. 453 U.S. at 937. In this case, Mr. Guste's belated attempt to challenge the trial court's decision suffers fatally from the same kind of "unexplained tardiness," particularly in light of the fact that Mr. Guste had to be aware of the trial court's consistent and early inclination to order a single board. *See supra* pp. 9-13.

Mr. Guste, however, mistakenly believes that his status as a counsel of record for the State puts him in better position than the Alabama Attorney General in *Graddick*. Supersession Motion at 17. Thus, Mr. Guste states that this case is distinguishable from *Graddick* due to "the absence of the Alabama Attorney General from the litigation therein until he filed a motion to intervene as a party at the last moment." *Id.* Mr. Guste misunderstands the effect of his presence in this litigation before the trial court. Mr. Guste's status as a co-counsel of record for the State procedurally and ethically bars him from taking a position on appeal adverse to the State and, more importantly, different from that asserted by the State below. Mr. Guste is indeed in a worse position than the Alabama Attorney General in *Graddick*.[23]

Although he participated little in the trial on remedy, Mr. Guste served as part of a co-counsel team on behalf of the State during the liability and remedy phases of the litigation before the trial court. His own Supersession Motion makes clear his agreement to cooperate with the State's position below:

> In March 1988, Charles E. "Buddy" Roemer, III took office as Governor of the State of Louisiana for the first time. *Later, at [the Governor's] request and in a spirit of cooperation to present a unified defense* of the [Louisiana] constitution and [its] statutes, the Attorney General of the

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[23] The Alabama Attorney General was also in a stronger position than Mr. Guste because the Alabama Attorney General was a named party defendant to the action, not, like Mr. Guste, merely co-counsel to a defendant. 453 U.S. at 929-30 (Opinion of Rehnquist, J.).

> State of Louisiana filed a motion on January 20, 1989 to enroll John N. Kennedy, Joseph J. Levin, Jr., and Carla Calobrisi as *additional* counsel for the State of Louisiana .
>
> . . .

Supersession Motion at 4-5 (first emphasis added; second emphasis in original). Mr. Guste then goes on to acknowledge that he agreed to "designat[e] John N. Kennedy as trial attorney for the State of Louisiana." *Id.* at 5. Thus, Mr. Guste squarely admits that he designated Mr. Kennedy, the Governor's counsel, as the lead trial attorney for the State.

The conclusion is inescapable, therefore, that Mr. Guste as co-counsel ratified the State's position at trial. During the period that Mr. Guste served as co-counsel, the State's legal team made numerous filings with the court on behalf of the State. One of these filings, the State Plan detailing a proposed remedy, included replacing the existing four governing boards of higher education with a single board. Special Master Paul Verkuil recommended a single board in his Final Report filed on May 30, 1989, and the trial court's Opinion and Order on July 19, 1989, decreed the measure. Mr. Guste received copies of each document. Certificate of Loretta F. Whyte (Dec. 22, 1989), State Appendix 106a.

Mr. Guste is now attempting to change the position of the State on appeal by opposing the Remedial Order which the State and its legal team (of which Mr. Guste was a part) proposed at trial. This is a result that he cannot achieve, procedurally or ethically. As this Court has declared, it is an elementary principle of civil procedure that "suitors may not maintain a position here [on appeal] which conflicts with that taken below [at trial]." *Seney v. Swift Co.*, 260 U.S. 146, 149 (1922). Moreover, under the most elementary ethical standard of fair play, Mr. Guste must be barred from abandoning the State's position after trial and taking an adverse position before an appellate tribunal.

The case of *People ex rel. Deukmejian v. Brown, 29 Cal. 3d 150, 172 Cal. Rptr. 478, 624 P.2d 1206 (1981), illustrates the ethical quagmire into which Mr. Guste has stepped. In Deukmejian*, the California Attorney General counseled the California Governor to sign a piece of legislation (an employer-employee relations act) and then advised the state agency charged with implementing the legisla-

tion after the legislation was challenged in court. 29 Cal. 3d at 154, 172 Cal. Rptr. at 479. In a legal about-face, however, the attorney general then sought a writ of mandate from an appellate court against the governor and the state agency to prohibit them from enforcing the legislation. *Id.*

The California Supreme Court held that "no constitutional, statutory, or ethical authority" existed to support the attorney general in acting adversely to the position of his statutory clients [the governor and the state agency]." 29 Cal. 3d at 155, 156, 172 Cal. Rptr. at 479, 480. In reaching its decision, the court relied on Rule 5-102 of the California State Bar Association Rules of Professional Conduct ("California Rules"), which is identical in its meaning to Rule 1.9 of the Louisiana California State Bar Association Rules of Professional Conduct ("Louisiana Rules") and Rule 1.9 of the Model Rules of Professional Conduct ("Model Rules"). *See* State Appendix 281a.

Here, Mr. Guste has exceeded the bounds of ethical propriety to an even greater extent than did the California Attorney General in *Deukmejian.* Mr. Guste, along with co-counsel, formally represented the State in the trial court. As noted above, the California Rules as well as the Louisiana Rules and the Model Rules, all contain the same ethical prohibition against taking a position adverse to that of a client. Moreover, all parties to this action, including the Government, relied throughout the remedial phase of this case upon the State's position in support of the single gerrymandering board. The entire litigation approach taken by the parties would have been markedly different had the position now advocated by Mr. Guste been asserted at trial.

For these reasons, therefore, Mr. Guste is ethically barred from challenging the position of the State before this Court after serving as co-counsel for the State at trial and after acquiescing in the State's position.

3. The Louisiana Constitution and United States Supreme Court Precedent Require That Mr. Guste's Supersession Motion First Be Addressed To The Court Of Original Jurisdiction.

Finally, Mr. Guste's assertion that he has the power to supersede the State's counsel pursuant to Article IV, Section 8 of the Louisiana Constitution of 1974, Supersession Motion at 12, fails to recognize the relevant language in Article IV, Section 8, which states:

> As necessary for the assertion or protection of any right or interest of the state, the Attorney General shall have authority . . . (3) *for cause, when authorized by the court which would have original jurisdiction* and subject to judicial review, . . . to *supersede* any attorney representing the state in any *civil* or criminal action.

La. Const. art. IV, § 8 (emphasis added), State Appendix 161a. The language of Article IV, Section 8 requires supersession to be authorized by the court of "original jurisdiction," not an appellate court.

Under Article IV, Section 8, Mr. Guste should have moved to supersede the State's counsel before the trial court ruled on post-trial motions on August 4, 1989. *See United States v. Louisiana*, 718 F. Supp. 521, Joint Appendix 105a; *United States v. Louisiana*, 718 F. Supp. 525, Joint Appendix 81a. Mr. Guste, however, not only filed the Supersession Motion on August 16, 1989, but filed it after he had filed the Guste Notice of Appeal on August 10, 1989. *See* Notice of Appeal, Joint Appendix 1157a. Thus, the federal district court, as the court of "original jurisdiction" for the purposes of Mr. Guste's Supersession Motion under Article IV, Section 8, may no longer possess any jurisdiction and, indeed, was likely without jurisdiction when Mr. Guste's motion was filed.

Furthermore, this Court consistently has refused to hear issues which were not raised in the lower courts. *See, e.g., DeShaney v. Winnebago County Dept. of Social Servs.*, 109 S. Ct. 998, 1003 n.2 (1989) (Court declined to consider issue not pleaded in complaint in district court, argued in court of appeals or raised in petition for certiorari); *Equal Employment Opportunity Comm'n v. Federal Labor Relations Auth.*, 476 U.S. 19, 24 (1986) ("Our normal practice, from which we see no reason to depart on this occasion, is to refrain from addressing issues not raised in the Court of Appeals.").

C. The McGlinchey Law Firm Is Ethically And Legally Prohibited From Participating On Behalf Of The Attorney General.

The participation of Dermot S. McGlinchey and the McGlinchey Law Firm as "Special Counsel" to Mr. Guste fatally taints Mr. Guste's appeal for two separate reasons: first, the McGlinchey Law Firm

previously represented Trustees, a defendant which has consistently taken a position diametrically opposed to that now asserted by the McGlinchey Law Firm at the behest of Mr. Guste, creating an obvious conflict of interest; and, second, the McGlinchey Law Firm was retained by Mr. Guste to perform legal services for him (and, according to Mr. Guste, also for the State) but was to be paid for performing those services by a third party, private client of the firm, Patrick F. Taylor,[24] thereby violating the Louisiana Ethics Code.

1. The Conflict Created By The McGlinchey Law Firm's Previous Representation Of Trustees And Present Representation Of Mr. Guste Violates The Louisiana Rules Of Professional Conduct.

As previously noted, its assistance in the preparation of the Guste Jurisdictional Statement was not the first involvement of the McGlinchey Law Firm in this litigation. *See supra* pp. 4-5. Earlier, the McGlinchey Law Firm had filed *amicus curiae* documents on behalf of a Governor's Commission (but without the Governor's knowledge or consent), as well as on behalf of the Trustees, in order to present evidence about the educational program known as the "Taylor Plan." *Id.*

Mr. Guste's position on appeal to this Court in opposition to the Remedial Order is in direct conflict with the position asserted by Trustees during the remedial phase of the case and on appeal. Throughout this litigation, Trustees has supported the replacement of the four-board system of governance with a single board. In fact, although all of the defendants challenge the trial court's finding of liability, all of the defendants, with the exception of Southern University, also support the trial court's Remedial Order almost in its entirety. The State, joined by Trustees, Regents and LSU, filed a Jurisdictional Statement reaffirming this position before this Court. *See* State Jurisdictional Statement at 1. Trustees has never consented to the McGlinchey Law Firm's representation of another party before this Court, much less the representation of another party clearly asserting a position hostile to that of Trustees.

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[24] It was Mr. Guste's and Mr. McGlinchey's expectation that Mr. Taylor would pay the McGlinchey Law Firm's legal fees and expenses for the preparation of the Guste Jurisdictional Statement. *See* Hill, *Privately Funded Legal Help Illegal*, The Shreveport Times, Oct. 29, 1989, at _, col. _, State Appendix 84a.

The McGlinchey Law Firm's conflicting representations violate basic ethical principles against representation of clients with adverse interests. In Louisiana, as in every other state, "[l]oyalty is an essential element in the lawyer's relationship to a client." Rule 1.7 of the Louisiana Rules, State Appendix 281a; Comment to Rule 1.7 of Model Rules, State Appendix 281a. A lawyer is ethically barred from representing "a client if the representation of that client will be directly adverse to another client" unless "each client consents after consultation." Rule 1.7(a) of the Louisiana Rules, State Appendix 285a; Rule 1.7(a) of ABA Model Rules, State Appendix 281a.

More specifically, in cases where a lawyer has represented a client, the lawyer "shall not thereafter . . . [r]epresent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interest of the former client consultation unless the former client consents after consultation." Rule 1.9(a) of Louisiana Rules, State Appendix 285a.

Similarly, the Louisiana courts have declared that it is an "inherent attribute" of the legal profession that "an attorney may not represent different interests which are hostile, or in conflict with one another." *Brasseaux v. Girouard,* 214 So. 2d 401, 404 (La. App. 3d Cir.), *writ denied,* 216 So. 2d 307 (La. 1968). *See also Plaquemines Parish Comm'n Council v. Delta Dev. Co.*, 502 So. 2d 1034, 1041 (La. 1987) (citing *Brasseaux* and stating that it is an "inherent attribute of [the legal] profession not to represent interests which were in conflict").

Based on the general power of this Court to regulate the conduct of attorneys appearing before it and the rationale found in *Brasseaux,* this Court should dismiss Mr. Guste's appeal and invalidate the Guste Jurisdictional Statement.

2. Involvement Of A Third Party Private Client In The McGlinchey Law Firm's Work For Mr. Guste Violates The Louisiana Ethics Code.

Under the Louisiana Ethics Code, members of the McGlinchey Law Firm, in representing the Louisiana Attorney General, were acting as "public servants" and "public employees" in preparing and filing the Guste Jurisdictional Statement. The Louisiana Ethics Code defines "public servant" as "a *public employee* or an elected official."

La. Rev. Stat. Ann. § 42:1102(19)(emphasis added), State Appendix 296a. The Code further defines "public employee" as:

> (18) [A]nyone, whether compensated or not, who is: . . .
>
> (c)Engaged in the performance of a governmental function.
>
> [or]
>
> (d)Under the supervision or authority of an elected official or another employee of the governmental entity.

La. Rev. Stat. Ann. § 42:1102(18)(c)-(d), State Appendix 295a. Clearly, the preparation and filing of Mr. Guste's document qualified the members of the McGlinchey Law Firm as "public servants" and "public employees" because such actions (i) constituted "the performance of a governmental function," subsection c, and (ii) were done under "the supervision" of Mr. Guste, subsection d.

As statutory "public servants" and "public employees" for the purposes of this litigation, the members of the McGlinchey Law Firm are prohibited from seeking or receiving any compensation from a private party for performance of their governmental duties. Section IIII(A) of the Louisiana Ethics Code establishes this long-standing rule: "No public servant shall receive any thing of economic value, other than compensation and benefits from the governmental entity to which he is duly entitled, for the performance of the duties and responsibilities of his office or position . . . ." La. Rev. Stat. Ann. {42:1111(A), State Appendix 298a.

Indeed, this very issue was presented for an advisory opinion to the Louisiana Commission on Ethics for Public Employees,[25] which administers the Louisiana Ethics Code, and was dismissed only after Mr. McGlinchey agreed on behalf of his firm to refrain from continuing with the case. *See* Letter from Dermot S. McGlinchey to William Lynch (Nov. 7, 1989), State Appendix 288a (dismissed on Dec. 13, 1989, Minutes not yet available). Although the McGlinchey Law Firm, through Mr. McGlinchey, belatedly swore in October 27 and October 31, 1989, Affidavits, State Appendix 288a, that it would accept no compensation for its work on the Guste Jurisdictional

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[25] Minutes, Louisiana Commission on Ethics for Public Employees (Oct. 26-27, 1989), State Appendix 291a.

Statement, the evidence is clear that Mr. Guste retained the firm with the expectation that the firm's client, Mr. Taylor, and not Mr. Guste through his state budget, would pay the law firm for its services. *See supra* note 24. Thus, the McGlinchey Law Firm undoubtedly prepared the Guste Jurisdictional Statement with the expectation that a private third party would pay for the performance of its governmental function and duties.

Regardless of whether the McGlinchey Law Firm now seeks or accepts such payment, its lawyers have prepared the Guste Jurisdictional Statement under the illegal influence that Section IIII(A) of the Louisiana Ethics Code was specifically designed to prevent. The law firm's rejection of payment, therefore, cannot avoid or cure the clear violation.

Moreover, even if the McGlinchey Law Firm had never expected any payment, its preparation of the Guste Jurisdictional Statement still violates Section IIII(A). The prohibition in Section IIII(A) does not refer simply to the payment of money; it encompasses the receipt of "any thing of economic value." The goodwill, prestige and continuing representation of Mr. Taylor that the McGlinchey Law Firm received is of considerable "economic value." Thus, the mere fact that Mr. Guste retained the McGlinchey Law Firm through a private third party is sufficient to establish the illegal influence addressed by Section IIII(A).

IV. CONCLUSION

The ethical and procedural problems created by Mr. Guste's appeal, the Guste Jurisdictional Statement and his false representations to this Court are immense. Sadly but clearly, they rise to the level of "conduct unbecoming a member of the Bar of this Court" under Rule 8 of the Supreme Court Rules. One sanction for such unbecoming conduct is suspension of an attorney from practice before the Court. Rule 8 of the Supreme Court Rules. In this instance, the power to dismiss Mr. Guste's appeal is a logical corollary of the Court's suspension power under Rule 8. As demonstrated in preceding sections, Mr. Guste's ethical and procedural errors reveal that he cannot properly represent the State of Louisiana before this Court. The necessary effect of this Court's exercise of its suspension power,

therefore, should operate as an independent basis for invalidating Mr. Guste's appeal. *See, e.g., United States v. Providence Journal Co.*, 108 S. Ct. 1502 (1988) (dismissal of previously-granted certiorari petition brought improperly by special prosecutor).

Additionally, it is well-settled that the Governor, under Louisiana case law and the Louisiana Constitution, is the official who has both the right and the responsibility to establish State policy and assert the State's position in this case. Not only does Mr. Guste lack "supremacy," he should be accorded no status in this case at all, representative or otherwise.

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